in a counter-affidavit. The Court of Appeal would have had power, if necessary, to decide this conflict by oral evidence taken before it under the provisions of S. 304 (1) of the Criminal Procedure Code. On the facts of this case, however, it is clear that the production at the trial of the three documents, if genuine, could not have affected the verdict.

The appellant does not now contend that the original petition of appeal disclosed any ground on which the Court of Appeal ought to interfere with the verdict and sentence of the Court of trial.

The appeal therefore fails on all the grounds argued before the Court."

Appeal dismissed.

Solicitors for the Appellant:—

Braddell Brothers.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

November 12, 1934.

HAJI SALLEH BIN HAJI ISMAIL & ANOR vs. HAJI ABDULLAH BIN HAJI MOHAMED SALLEH & ORS.

[PENANG SUIT No. 7 of 1934]

Charitable trusts—Presumption of dedication—Mohamedan Mosque.

In the case of a mosque, usage constitutes presumptive evidence of its dedication to charitable trusts.

If the founder of the trust has not actually reserved to himself the administration of the wakaf or trust or has not conferred that duty upon another, the administration must be entrusted to the Court.

Trial of Action.

The facts are sufficiently stated in the Judgment.

Ross for the Plaintiffs.

Hogan for the 1st and 2nd Defendants.

de Buriatte for the 3rd Defendants.

Cur. Ad. Vult.

WHITLEY, J.—The Plaintiffs in this case claim to have been for some thirty years the managers of the Mosque at Permatang Sungei Dua erected on land forming Lot 355 1. Mukim X. Province Wellesley and they sue on behalf of themselves and all other members of the congregation having the same interest. The 1st and 2nd Defendants claim to be trustees of the said land and mosque by virtue of an order of Court obtained by them *ex parte* on the 11th March, 1932. When in this judgment I refer to the Defendants I shall be referring to these Defendants and not the 3rd Defendants, the Mohamedan and Hindu Endowments Board who are only joined *pro forma* and against whom no relief is claimed. The Plaintiffs claim (1) To set aside the order of the 11th March, 1932, (2) A declaration that the land is wakaf (3) Appointment of new trustees and (4) an injunction restraining the Defendants from interfering in the management of the Mosque.

The following facts were either admitted or proved in the course of the hearing. Lot 355 1. which I shall refer to as "the land" was originally granted in 1831, to Penghulu Rassip and the next recorded transaction is a transfer of the land in 1879, by one Wan Dain to one Haji Dain. The latter is the grandfather of the Defendants. At the date of that transfer there was already a Mosque on the land with a burial ground attached and that Mosque and burial ground were the only mosque and burial ground which have existed in Sungei Dua within the memory of living man. That appears from the evidence of Haji Mat Arshad, a seventy years old witness called by the defence who was born in the village and has lived there all his life. That mosque was a wooden mosque which was later replaced by another wooden Mosque, which in its turn was replaced by the present stone structure erected by public subscription in 1909. From time immemorial prayers have been continuously held in these Mosques and burials taken place in the burial ground. The greater part of the Mosque is built on Lot 355 1. but a small portion of it is on Lot 355 11. The burial ground occupies Lot 355 11. with one grave only on Lot 355 1. That part of Lot 355 1. which is not covered by the actual building is vacant land with six coconut trees. On it there is a well which supplies water for the Mosque and a cooking place which is used for feasts in connection with the Mosque. The whole area of the lot including the Mosque is only 1 rood 2 poles.

Nothing of importance material to this case appears to have taken place during the lifetime of Haji Dain except the alleged dedication which is disputed. He officiated as Imam and died intestate in 1895, Letters of administration to his estate being granted in 1896 to his eldest son Haji Zachariah the father of the 2nd Defendant. In 1897, Haji Zachariah included Lot 355 1. in the affidavit which he swore as to the deceased's property and stated that all this property had already been conveyed to the next of kin. Twenty two years later—in 1919—he as Administrator executed a conveyance of this Lot together with another lot in a different Mukim to his brother Haji Mohamed Salleh (the father of the 1st Defendant) as his distributive share of the Estate. If as stated in his affidavit these Lots had already been conveyed in 1897, the reason for the 1919 conveyance is not apparent. The Plaintiffs contend that this conveyance was fraudulent and invalid inasmuch as the land was

already wakaf and charitable land and therefore not capable of being conveyed.

On the 8th April 1920, Mohamed Salleh executed a trust deed whereby he purported to appoint himself and his brother Zachariah to be trustees of the land and Mosque, to be succeeded as trustees by their lineal descendants. Mohamed Salleh died in 1922, and Zachariah in 1930 and it was only after the death of the latter that friction began to develop. I do not propose at this stage to go into the details of this friction but it is clear that in 1931 and 1932 the hitherto united and contented congregation became divided into two factions. In the course of the evidence I formed a very definite opinion as to who was to blame for this regrettable state of affairs but it will be more convenient to deal with that question later.

On the 11th March, 1932, the 1st and 2nd Defendants obtained *ex parte* the Order of the Court appointing them trustees of the land and Mosque. Armed with this they endeavoured to assert their authority and to assume the management of the affairs of the Mosque including the leading of the prapers but met with strenuous opposition. The Mohammedan Advisory Board made every effort to settle the matter but failed.

Before considering the law I will state the conclusions to which I have come as to the facts. I was very favourably impressed by the two Plaintiffs. They are both about fifty years of age and struck me as fine types of the rural Malay who ever since they grew up have taken a keen interest in the affairs of this the only mosque in their village. They seemed to me to state their case with moderation and fairness and under cross-examination they were refreshingly frank and ready to concede a point to their opponents. Substantially then I have no hesitation in accepting their evidence supported as it was in most material particulars by that of the Imam who admittedly has enjoyed the confidence of the whole congregation for so many years.

I am satisfied that the piece of land has been regarded as wakaf for over 50 years and probably much longer. The Imam aged 62 remembers it as Wakaf when he came back from Mecca at the age of 12 and he heard from the elders that it had been made wakaf by Toh (meaning "grandfather") Rassip, referring presumably to Penghulu Rassip the original grantee in 1831. The Plaintiffs have all their lives understood that Haji Dain had made it wakaf and in view of the transfer of 1879 this would appear more likely. Haji Tahah who gave his age as 60 or 65 and who locked even older remembers a mosque on this land since boyhood and said that he had always known the land as wakaf. He knew Haji Dain and states that the land was wakaf during Haji Dain's lifetime, though he does not know who made it wakaf. This was a transparently simple and honest witness and I believed every word he said.

I am equally satisfied that the Plaintiffs have for a long time taken a prominent part in the affairs of the Mosque and jointly carried out the somewhat vague duties of what is known as " penghulu masjid " with acceptance to the congregation. I doubt very much whether they or any others before them ever received any formal appointment. This is a small rural community all belonging to this one mosque and the impression which I formed from the evidence as a whole was that the constitution which had worked satisfactorily for so many years was quite informal. The control in so far as spiritual matters were concerned lay with the Imam in so far as other matters were concerned with the Elders. The persons who under the direction of the Imam and the Elders actually looked after the structure, repairs, furniture, provision of oil and such like matters are known as "penghulu masjid." The position is purely honorary and no salary attaches to it. The Defendants sought to prove that Haji Jacob had filled this position and that the Plaintiffs had not. He gave evidence but was not a convincing witness and I incline to the view that he was probably the Defendants nominee for the position when they embarked upon their attempt to oust the Plaintiffs.

To sum up, the conclusions to which I have come upon the evidence as a whole after carefully observing the witnesses and their demeanour are shortly as follows. As long as anyone living can remember there has been a mosque on this land with a burial ground adjoining, this being the only mosque in Sungei Dua. The land has always been regarded as wakaf land and the probability seems to be that Penghulu Rassip obtained the grant in 1831, in order that a mosque might be erected there, that when the earliest mosque was erected the part of the land upon which it actually stood was made wakaf and that later the part of the land not actually covered by the building itself was made wakaf by Haji Dain. That would explain how one witness had heard that " Toh " Rassip had made it wakaf and others that Haji Dain had done so. However that may be the land had become wakaf before the death of Haji Dain in 1895.

Haji Dain's sons Mohamed Salleh and Zacharia appear to have been devout Mohammedans and to have taken the same keen interest in the affairs of the mosque which their father had taken. Both of them officiated at some time or another as Imam of the Mosque and Mohamed Salleh was regarded as the headman or principal of the elders. As such he was anxious to regularise the position by making some provision for trustees and with that object he had Lot 355 1., which still figured in the list of his father's

properties, conveyed to him as part of his distributive share and then executed the trust deed. I have little doubt that his intention in so doing was not to create for the first time a wakaf which had hitherto not existed but to confirm formally as Wakaf land this Lot and to ensure, if he could, that the trusteeship should be kept thereafter in the family. There is no evidence that the existence of this trust deed was known to anyone except Mohamed Salleh and Zacharia. When Mohamed Salleh died in 1922, no new trustee appears to have been appointed as required by Clause 4 of the Deed and when Zacharia died in 1930, the Mosque seems to have carried on peacefully without any trustees until some trouble arose over the raising of funds for the Mosque by Haji Hassan in 1931. I do not propose to go into the details of this matter but I have little doubt that the first Defendant was the real cause of the friction which thenceforward disturbed the tranquillity of the congregation. He had been away at Mecca for several lengthy periods conducting parties of pilgrims and when he began to assert himself and tried to acquire control over the affairs of the Mosque the majority of the congregation—nine tenths was the estimate of Mr. Aston the Chairman of the Mohammedan Advisory Board—resented it. They were entirely satisfied with the venerable Imam who had officiated either as assistant or full Imam for some thirty years and with the unobtrusive management by the Elders assisted by the Plaintiffs and it can be readily understood that this younger man of 35 would not be so acceptable to them. There were incidents at the Friday prayers and matters came to a head when the 1st Defendant sent a lawyer's notice to the Imam in which he set out his claim to manage the Mosque property and complained that when he returned recently after being away for a considerable time he found the Imam and two other elders "in entire management of it." He then obtained the Order of the Court and created a scene at the Friday prayers which led to the Plaintiffs instituting these proceedings.

Before coming to the law I should perhaps deal with two points strongly relied upon by the Defendants. The first which was emphasised throughout was that quit rent and assessment for the land is still being paid by the sons of Zacharia and not by the Mosque. A receipt was produced and it is also in evidence that the sons of Zacharia take the proceeds of the coconut trees. This income amounts annually to a dollar and a few cents and almost exactly balances the quit rent and assessment. This was relied upon to show either that the land is not wakaf or that the descendants of Zacharia collect this income and pay out what is due by virtue of the position which they hold under the trust deed. I can see no substance in this contention. The trust deed was registered against the land and naturally the collector would look to the representatives of Zacharia the surviving trustee for these payments.

The second point was one which only emerged at the eleventh hour towards the close of the evidence for defence. Two witnesses deposed to an oral dedication by Mohamed Salleh after prayers three months after the completion of the new mosque in or about 1909. One of them Haji Jacob remembered after a lapse of 25 years of the actual words used "I make this land and this mosque wakaf. Because I have laboured and spent money on this do you all like me to be the trustee of this together with Haji Zacharia and after us our descendants? Everyone present agreed." I view this piece of evidence with such suspicion that I unhesitatingly reject it. Although so important to the Defendants' case and an event which one would think would be recollected by all the elders they never informed their counsel of the incident and it was not pleaded. The recollection of the two witnesses was surprisingly detailed and similar and although this is alleged to have happened in 1909, or soon after, Mohamed Salleh had no title to transfer the land until 1919.

It follows from these findings of facts that in my view there could be no effective dedication by Mohamed Salleh for the reason that the whole of the evidence and circumstances point irresistibly to a prior dedication many years earlier. There had been a mosque upon this land regularly used for purposes of public prayer for many decades prior to the execution of the trust deed and the alleged oral dedication by Mohamed Salleh of land which did not then belong to him.

In determining what is the legal position in such circumstances it is necessary to consider first the law of England and then the Mohammedan law since the three Charters of Justice of 1807, 1826 and 1855 under which the Supreme Court of the Colony is constituted, provided that the administration of justice is to be adapted as far as circumstances permit to the religious manners and customs of the several classes of litigants.

Rejecting as I do for the reasons which I have given the alleged dedications of comparatively recent date the origin of this charity remains obscure and that being so usage constitutes presumptive evidence of charitable trusts. (*Halsbury* 2nd Edition Vol. 4. p.210). The evidence of usage here is overwhelming. I need only quote two passages from judgments of Sir John Romilly, M.R. to show how strongly

the Courts in England have expressed themselves on this point.

In the case of *Attorney-General* v. *Ewelme Hospital*, 51 E.R. p. 1085 at p. 390 he observes:—"Undoubtedly, when a person or corporation is found possessed of and in the enjoyment of a right, the origin of which is not ascertained, the Court will protect the possessor in the enjoyment of that right and will presume anything (including in some cases, even an Act of Parliament) that may be necessary for that purpose, ..."

Again in *Attorney General* v. *St. Cross Hospital*, 17 Bearan 464. he used the following words:—"Undoubtedly where the whole origin of a charity or a right is lost in obscurity. the Court will presume, from the uniformity of the practice or use, that it is in accordance with the original foundation or right, and will presume whatever may be necessary to give it validity."

These statements of the law have been frequently approved and never dissented from. Applying these principles to the facts as I have found them in the present case it seems my clear duty to presume a dedication either by Haji Dain or by someone before him.

The case of *Addlington* v. *Cann*, 26 English Reports 885 relied upon by the Defendants to support the proposition that the Court will not set up a trust for charity without a declaration in writing is no authority in the present case as that case turned upon a question of construction in a will. Indeed the applicability of such a proposition to the present case was apparently tacitly abandoned by Mr. Hogan when he endeavoured to set up and rely upon the oral dedication in 1909. In the course of the hearing he was driven into the untenable position of having to argue that prior to the trust deed of 1920 Mohamed Salleh or his predecessors could have alienated and given a good title to the land even though there had been a mosque built on it from time immemorial regularly used for purposes of prayer. On this point the case of *Ex parte Greenhouse*, 56 E.R. p. 36 at para. 107 seems conclusive. Sir Thomas Plumer, V.C. observes:—"There is no clear account of what was the nature of this Chapel. Certainly it was an ancient chapel, and existed for some length of time antecedently to the purchase of it by Foxe. It had a public Cemetry belonging to it—a Communion Table—Pews in right of Houses—and there were Christenings there—circumstances which, in addition to director's objection to repairing the Chapel, on account of a Diminution of his Easter Dues. strongly show it was a Parochial Chapel. According to Degg (ch. 12 p. 1), and Kennet "Paroch Antiq. 590 and 591), baptism and sepulture, are proofs of a Parochial Chapel. In the absence of other evidence this must be taken to be a Parochial Chapel. Though Foxe and others contributed to the Stipend of the Minister, yet probably that was only an addition to his Stipend. If it was a public Chapel, it must have been consecrated, and by that solemn Rite dedicated to the service of God, and separated from all unhallowed uses, and could not be unconsecrated, but by Parliament."

Turning to Mohammedan Law (which the parties agreed should be taken from certain text books) it is clearly laid down that mosque property can never be applied to other objects *Tyabji* Principles of Mohammedan Law 2nd Edition p. 642), and again in *Minhaj et Talibin* on Mohammedan Law page 232). "The ground of a mosque can in no case be sold, even though the building may have fallen into ruin....." As to whether this land was mosque property prior to the trust deed of 1920 the principles set out in all the text books seem to establish decisively that it was. It appears from *Syed Ameer Ali* on Mohammedan Law (pages 62, 303, 305 and 306) that in order to create a gift in Mohammedan Law it is not necessary to make use of any express terms. Even when the declaration and acceptance are not expressed in words so long as the intention is evidenced by conduct it would be sufficient. The proprietary right of the "wakif"—i.e. the grantor or appropriator—in a building or ground set apart for prayers becomes extinguished either on the declaration of the wakif that he has constituted a mosque or consecrated it for worship or on the performance of prayers therein or thereon. A piece of land may be dedicated for the performance of public prayers and though there is no building thereon if prayers have been habitually performed thereon it is wakaf and subject to the rules governing a mosque. When a person erects a building with the object of dedicating it as a mosque and permits people to offer prayers therein without declaring that he has constituted it into a mosque and prayers are offered there congregationally the mosque becomes irrevocably dedicated and even if prayers are offered only once in a mosque it is sufficient to constitute a good dedication. According to the accepted doctrine even where there is no evidence of an express dedication in words, if it appears that one single individual (other than the grantor) has offered his prayers at the place, or one single person has been buried in the cemetery, the dedication for the specific purpose must be regarded as complete. Such use of the subject of the wakaf being in conformity with its avowed or ostensible object should be considered as conclusive of the dedication.

The ownership of the thing immobilised is transferred to God; which means that such object ceases, for men, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary. (*Minhaj et Talibin*, p. 232).

Clearly then this land must be treated as having been wakaf from the time when the congregation were first permitted to pray in the mosque that is to say well over half a century ago and certainly long before Mohamed Salleh purported to make his dedication.

It was suggested that that part of the land which is not actually covered by the mosque building should be regarded as something distinct and apart from the mosque but inasmuch as that part of the land has on it the well which supplies the mosque and the place where the food for the mosque feasts are prepared I think it is clear that the original grantor must have intended that the whole should be wakaf and I am prepared to presume that and it follows that the Plaintiffs are entitled to a declaration that the land has been wakaf for a period of over 30 years.

With regard to the Order of the 11th March, 1932 whereby the 1st and 2nd Defendants were appointed trustees under the Deed of 1920 this clearly cannot stand in view of the fact that section 13 of Ordinance 92 (Mohammedan and Hindu Endowments) was not complied with.

The Plaintiffs ask that new trustees be appointed. The present position is that there are no trustees and the impression which I have gathered from the evidence is that there never have been any trustees formally appointed. Although in the past the congregation through the elders and the Imam seem to have managed the affairs of the mosque quite happily in an informal manner it seems clearly desirable now in view of the recent friction that trustees should be appointed. If the trust deed of 1920 were of any effect the Court would have no right to supersede the express directions contained in the deed itself. *Ludlow (Corpn. of)* v. *Attorney General*, 4 English Reports 580. And when the founder of a charity commits the administration of a trust to a man and his heirs the Court cannot interfere with their discretion so long as they perform their trust properly. *Attorney General* v. *Boucherette*, 53 English Reports 580. But it is clear from the judgments in those cases that where the founder has given no such directions the Crown as *parens patriae* has the power to appoint through the Court.

According to Mohammedan Law where the founder has reserved to himself the administration of the wakaf or conferred this duty upon another that disposition must be adhered to; but if the founder has made no stipulation with regard to this the administration must be entrusted to the Court. (*Minhaj et Talibin*, page 233). It would appear from a passage in the judgment in the Indian case of *Khajeh Salimullah* v. *Abdul Khair M. Mustafa*, 37 Calcutta page 275 that if the founder dies without appointing any person the Cadi should appoint a member of the founder's family if a fit and proper person can be found and if none such person can be found then a stranger who is fit and proper but on the other hand according to *Tyabji* (at page 611) Mohammedan Law is strongly opposed to the attaching of any right of inheritance to the administration of the wakaf property. In a case such as the present one I think the Court must have a wide discretion and as the Mohammedan Advisory Board have expressed their willingness to assist in this matter, I propose to ask them to recommend two fit and proper persons and I reserve the appointment of two trustees until they have made their recommendations.

As regards the prayers added by the Plaintiffs at the hearing asking that the conveyance of 3rd December 1919 and the Trust Deed of 8th April, 1920 be set aside I do not feel I can make such orders as the parties to the two Deeds are not properly before the Court.

I was further asked to give a ruling as to whether it is necessary to make the Mohammedan and Hindu Endowments Board a party after their order has been obtained under section 13 of Ordinance 92. The question was not fully argued but I am disposed to think that it is not necessary and that it is sufficient that they can be allowed to come in as parties if they think fit.

In the present case I should like to record my appreciation of the valuable assistance which they gave to the Court. They ask for no order as to costs.

There will be judgment for the Plaintiffs against the 1st and 2nd Defendants with costs. They are also entitled to the injunction asked for. There will be liberty to apply.

Judgment accordingly.

Solicitors for the Plaintiffs—*Logan, Ross, & Samuel.*

Solicitors for the 1st & 2nd Defendants—*Hogan & Ivens.*

Solicitors for the 3rd Defendants—*Presgrave & Matthews.*